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Charles Y. Lackey
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In re Application of
Bryant, et al.
Application No. 10/655,115
Filed: September 4, 2003
Attorney Docket No. N/A
FOR: ADJUSTABLE AND PORTABLE SOCCER
GOAL AND MOLDED JOINT CONNECTORS
ASSOCIATED THEREWITH

DECISION DISMISSING
PETITION

This is a decision on the petition under 37 CFR 1.137(a), filed November 10, 2005, to revive the above-identified application.

The petition under 37 CFR 1.137(a) is **DISMISSED**.

Any further petition to revive the above-identified application must be submitted within TWO (2) MONTHS from the mail date of this decision. Extensions of time under 37 CFR 1.136(a) are permitted. The reconsideration request should include a cover letter entitled "Petition under 37 CFR 1.137(a)." This is **not** final agency action within the meaning of 5 U.S.C. § 704.

The above-identified application became abandoned for failure to timely reply to Notice of Allowance and Fee(s) Due, mailed February 4, 2005, which set a non-extendable period for reply of three (3) months. Having filed no reply, this application became abandoned on May 5, 2005. A Notice of Abandonment was mailed on October 18, 2005.

Petitioner states that the delay was unavoidable because the Notice of Allowance and Fee(s) Due mailed on February 4, 2005 was not received at the correspondence address of record until an Office employee faxed it in October of 2005.

A grantable petition to revive an abandoned application under 37 CFR 1.137(a) must be accompanied by (1) the required reply, unless previously filed. In a nonprovisional application abandoned for failure to prosecute, the required reply may be met by the filing of a continuing application. In an application or patent, abandoned or lapsed for failure to pay the issue fee or any portion thereof, the required reply must be the payment of the issue fee or any outstanding

balance thereof; (2) the petition fee as set forth in § 1.17(l); (3) a showing to the satisfaction of the Commissioner that the entire delay in filing the required reply from the due date for the reply until the filing of a grantable petition pursuant to this paragraph was unavoidable; and (4) any terminal disclaimer (and fee as set forth in § 1.20 (d)) required pursuant to paragraph (c) of this section.

This petition does not satisfy requirements (1) and (3).

With respect to (1), petitioners have not submitted the issue fee, the publication fee, and acceptable corrected formal drawings. A copy of the February 4, 2005 Notice of Allowance and Fee(s) Due is enclosed. **Please complete the Part B- Fee(s) Transmittal and return it with along with the issue fee and publication fee as part of the reply in the reconsideration petition.**

Since practitioner alleges non-receipt of the February 4, 2005 Notice of Allowance and Fee(s) Due, it is assumed that practitioner does not have a copy of the February 4, 2005 Notice of Allowance, either. Therefore, a copy is enclosed to complete practitioner's records.

Please note that the corrected drawings submitted on October 21, 2005 were objected to by the Draftsperson. See enclosed Notice of Draftsperson's Patent Drawing Review, dated November 21, 2005. Acceptable drawings are still required. **Please submit corrected formal drawings as part of the reply in the reconsideration petition.**

With respect to (3), the showing of record is inadequate to establish unavoidable delay within the meaning of 37 CFR 1.137(a). Specifically, an application is "unavoidably" abandoned only where petitioner, or counsel for petitioner, takes all action necessary for a proper response to the outstanding Office action, but through the intervention of unforeseen circumstances, such as failure of mail, telegraph, telefacsimile, or the negligence of otherwise reliable employees, the response is not timely received in the Office. Ex parte Pratt, 1887 Dec. Comm'r Pat. 31 (Comm'r Pat. 1887).

The Commissioner may revive an abandoned application if the delay in responding to the relevant outstanding Office requirement is shown to the satisfaction of the Commissioner to have been "unavoidable". 35 U.S.C. § 133. Decisions on reviving abandoned applications have adopted the reasonably prudent person standard in determining if the delay was unavoidable. Ex parte Pratt, 1887 Dec. Comm'r Pat. 31, 32-33 (Comm'r Pat. 1887) (the term 'unavoidable' "is applicable to ordinary human affairs, and requires no more or greater care or diligence than is generally used and observed by prudent and careful men in relation to their most important business"); In re Mattullath, 38 App. D.C. 497, 514-15 (D.C. Cir. 1912); Ex parte Henrich, 1913 Dec. Comm'r Pat. 139, 141 (Comm'r Pat. 1913). In addition, decisions on revival are made on a "case-by-case basis, taking all the facts and circumstances into account." Smith v. Mossinghoff, 671 F.2d 533, 538, 213 USPQ 977, 982 (D.C. Cir. 1982). Finally, a petition to revive an application as unavoidably abandoned cannot be granted where a petitioner has failed to meet his or her burden of establishing the cause of the unavoidable delay. Haines v. Quigg, 673 F. Supp. 314, 5 USPQ2d

The showing required to establish non-receipt of an Office communication must include :

1. A statement from the practitioner stating that the Office communication was not received by the practitioner and attesting to the fact that a search of the file jacket and docket records indicates that the Office communication was not received.
2. A copy of the docket record where the non-received Office communication would have been entered had it been received and docketed must be attached to and referenced in practitioner's statement.

A review of the record indicates no irregularity in the mailing of the February 4, 2005 Notice, and in the absence of any irregularity there is a strong presumption that the communication was properly mailed to the applicants at the correspondence address of record. This presumption may be overcome by a showing that the aforementioned communication was not in fact received.

Petitioners have not proven non-receipt because (1) practitioner has not attested to the fact that a search of the file jacket and docket records indicates that the Office communication was not received and (2) practitioner has not included a copy of the docket record where the non-received Office communication would have been entered had it been received and docketed.

Further correspondence with respect to this matter should be addressed as follows:

By mail: Mail Stop PETITION
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By hand: U.S. Patent and Trademark Office
Customer Service Window, Mail Stop Petition
Randolph Building
401 Dulany Street
Alexandria, VA 22314

By FAX: (571) 273-8300 - ATTN: Office of Petitions

Telephone inquiries concerning this decision should be directed to the undersigned at (571) 272-3230.

A handwritten signature in black ink, appearing to read "E. Shirene Willis". The signature is fluid and cursive, with a large initial "E" and a stylized "W".

E. Shirene Willis
Senior Petitions Attorney
Office of Petitions
Office of the Deputy Commissioner
for Patent Examination Policy

enclosures: February 4, 2005 Notice of Allowance and Fee(s) Due
 February 4, 2005 Notice of Allowability
 November 21, 2005 Notice of Draftsperson's Patent Drawing Review